TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 259.

THE UNITED STATES, PETITIONER,

vs.

G. FALK & BROTHER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 19, 1906. CERTIORARI AND RETURN FILED MAY 14, 1906.

(20204.)

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a United States Circuit Court of Appeals for the Second Circuit.

G. FALK & BROTHER, APPELLANTS,
vs.
THE UNITED STATES, APPELLEE. } 3577.

TRANSCRIPT OF RECORD.

Appeal from the Circuit Court of the United States for the Southern District of New York.

1 At a stated term of the United States Circuit Court for the Southern District of New York, held in the United States post-office building in the city of New York, borough of Manhattan, on the 24th day of June, 1904.

Present: Hon. E. Henry Lacombe, circuit judge.

In the matter of the application of G. Falk & Bro. for a review of the decision of the Board of United States General Appraisers upon certain merchandise imported by them on the vessel and entered on the dates named in the accompanying schedule. } Order.

On reading and filing the petition of Gustav Falk, dated the 24th day of June, 1904, doing business under the name and style of G. Falk & Bro., and on motion of Hatch, Keener & Clute, attorneys for the petitioner, it is

Ordered that the Board of United States General Appraisers return to this court the record and evidence taken by them in the above matter, together with a certified statement of the facts involved and their decision thereon.

E. HENRY LACOMBE,
United States Circuit Judge.

2 United States Circuit Court for the Southern District of New York.

In the matter of the application of G. Falk & Bro. for a review of the decision of the Board of United States General Appraisers upon certain merchandise imported by them on the vessel and entered on the dates named in the accompanying schedule. } Petition.

To the Circuit Court of the United States for the Southern District of New York:

The petition of Gustav Falk respectfully shows and said petitioner alleges—

That he is now and at the times herein mentioned was doing business at number 171 Water street, in the city of New York, under the firm name of G. Falk & Bro.

That under such firm name your petitioner imported and entered at the port of New York certain merchandise on the dates mentioned in the accompanying schedule. That thereafter the collector at that port proceeded to ascertain, fix, and liquidate the rate and amount of duty to be paid on such merchandise under the provisions of an act of Congress entitled "An act to provide revenue for the Government, and to
3 encourage the industries of the United States," approved, and which took effect on the 24th day of July, 1897, and which rate and amount was in excess of the rate and amount required by law to be paid thereon under the said act.

That your petitioner being dissatisfied with the decision of the said collector as to the rate and amount so fixed, within ten days after, but not before said ascertainment and liquidation of duties, gave notice in writing to the collector, setting forth therein distinctly and specifically, in respect to each entry and payment, the reasons for their objections thereto, and paid the full amount of the duties and charges ascertained to be due thereon.

That thereafter the said collector transmitted the invoice and all the papers and exhibits connected therewith to the Board of United States General Appraisers, who, within the past thirty days, and on or about the 25th day of May, 1904, as set forth in the following schedule, reported that they had examined and decided as to the said entries and affirmed the decision of the said collector.

That your petitioner is dissatisfied with said decision of said Board of General Appraisers as to the construction of the law as to the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, and that the following is a concise statement of the errors of fact and law complained of:

ERRORS OF FACT AND LAW.

First. The Board of United States General Appraisers erred in following in re Schmid, G. A. 4214 (T. D. 19715).

Second. The Board erred in holding that the duties on the tobacco in question were properly collected and based upon the weight of said tobacco at the time of entry.

4 Third. The Board erred in not holding that under the law, and particularly under section 20 of the Customs Administrative Act of June 10, 1890, as amended by the Act of Congress, approved December 15, 1902, the protestants should be required to pay only the duties and charges to which the merchandise was subject by law at the time of its withdrawal from bonded warehouse for consumption.

Fourth. The Board erred in not holding that the customs officials erred in levying and collecting duties upon the weight of the merchandise at the time of its entry or importation, and in not holding that under the law the customs officials should reweigh the goods at the time of their withdrawal from bonded warehouse, and that the duties should be levied and based upon the weight at the time of such withdrawal, and also in not directing the refunding to the G. Falk & Bro. of the difference between the duties based upon the weight at the time of withdrawal from warehouse.

Fifth. The Board erred in overruling the protests and affirming the decision of the collector, and in not sustaining the protests and reversing the decision of the collector.

The following is a description of the importations embraced in this petition, namely:

SCHEDULE.

Description of merchandise.	Name of vessel.	Date of entry.	Number of protest.	Date of decision.
Tobacco	Ryndam ..	June 2-02	106, 197-17, 868	May 25, 1904
	Ryndam ..	June 2-02	106, 199-21, 870	May 25, 1904
	"	"	106, 198-18, 401	

5 Wherefore your petitioner prays that the said Circuit Court review the questions of law and fact involved in the decision of the Board of United States General Appraisers heretofore made in the above matter as to the classification and rate of duty assessed upon the merchandise, and for that purpose that an order may be entered requiring said Board of United States General Appraisers to return to the said Circuit Court the record and evidence taken by them, together with a certified statement of facts involved in the case, and their decision thereon, and your petitioner prays for such additional orders and relief as it may be entitled to in the judgment of this court, and pursuant to the statutes of the United States in such case made and provided.

Dated New York, June 24, 1904.

G. FALK & BRO.,
By HATCH, KEENER & CLUTE,
Attorneys.

HATCH, KEENER & CLUTE,
Attorneys for Petitioner,
100 Broadway, New York City.

Know all men by these presents: That I, Walter F. Welch, residing at No. 52 Morningside avenue, in the city of New York, am held and firmly bound unto the United States of America in the sum of fifty ($50) dollars, to be paid to the United States of America, for the payment of which, well and truly to be made, I bind myself, my heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with my seal and dated the 24th day of June, in the year nineteen hundred and four.

WALTER F. WELCH. [L. S.]

6 Whereas G. Falk & Bro. has applied to the Circuit Court of the United States for the Southern District of New York for a review of the questions of law and fact involved in a certain decision of the Board of United States General Appraisers, made on certain mer-

chandise imported by said G. Falk & Bro. and entered on the vessels and dates named in the foregoing schedule;

Now, therefore, the condition of this obligation is such that if the said G. Falk & Bro. shall prosecute said proceeding with effect, and pay all damages and costs which shall be awarded against them therein if they fail to make said proceeding good, then this obligation to be void otherwise the same shall be and remain in full force and effect.

WALTER F. WELCH. [L. S.]

Sealed and delivered and taken and acknowledged this 24th day of June, 1904.

[SEAL.] A. DELOS KNEELAND,
Notary Public No. 78, New York County.

UNITED STATES OF AMERICA,
Southern District of New York, county of New York, ss:

Walter F. Welch, being duly sworn, says: That he resides in the Southern District of New York, in the city of New York, and that he is worth the sum of one hundred ($100) dollars over and above all his just debts and liabilities.

WALTER F. WELCH.

Sworn to before me this 24th day of June, 1904.

[SEAL.] A. DELOS KNEELAND,
Notary Public No. 78, New York County.

7 The above bond is hereby allowed.

E. HENRY LACOMBE,
U. S. Circuit Judge.

(Endorsed:) United States Circuit Court for the Southern District of N. Y. In the matter of the application of G. Falk & Bro. for a review of the decision of the Board of United States General Appraisers relative to tobacco. Petition, order, and bond. Hatch, Keener & Clute, attorneys for petitioner, 100 Broadway, N. Y. City. U. S. Circuit Court, Southern District of New York. Filed June 24, 1904. John A. Shields, clerk.

In the Circuit Court of the United States for the Southern District of New York.

In the matter of The application of G. Falk & Bro. for the review of a decision of the Board of U. S. General Appraisers as to the amount of duty on certain tobacco imported in the S/S "Ryndam," June 2, 1902.	Suit No. 3577. Return of the Board of United States General Appraisers to the order of Hon. E. Henry Lacombe, circuit judge. Dated New York, Jul. 21, 1904.

The Board of United States General Appraisers, sitting at New York, in response to the order of the court in the above mat'er, make the fol-

lowing return of the record and evidence taken by them in the
8 above matter, and of the facts involved therein, as ascertained by them.

They state that a letter, hereto annexed as Exhibit A, was received from the collector of customs at New York, submitting, under the provisions of section 14 of the act of June 10, 1890, the protests marked Exhibits B, C, and D and described as follows:

Coll's. No.	Board No.	Protestants.	Vessel.	Date of entry.
17868	106197	G. Falk & Bro.....	Ryndam	June 2, 02
18401	106198	"	"	"
21870	106199	"	"	"

On May 25th, 1904, the Board rendered a decision upon said protests. A copy of the opinion is annexed as Exhibit E and a copy of G. A. 4214 is annexed as Exhibit F.

Exhibit A.

United States Customs Service,
Port of New York, February 4, 1904.

Board of U. S. General Appraisers,
Port of New York.

Gentlemen: I submit the protests of G. Falk & Bro., Nos. 17868, 18401 and 21870, against the assessment of duty as made by this office on certain "tobacco" imported by them in the "Ryndam," June 2, 1902.

I have to state that the original warehouse entry was liquidated July 3, 1903. As none of these protests was lodged within ten days after that date, they are rejected by this office as not being lodged within the statutory time. Note G. A. 91, 127, 3311, 5478, and 5512.

9 Moreover, an inspection of the invoice and entry shows that the tobacco in question was assessed with duty upon the weight as found and returned by the U. S. weigher at time of importation. Note proviso to section 33, act of July 24, 1897, and G. A. 4214.

Respectfully, yours,

J. J. Couch,
Special Deputy Collector.

5 inclosures.

(Endorsed:) 106, 197, 106, 199. United States customs service, port of New York, N. Y., office of the collector. February 5, 1904. N. N. Stranahan, collector. Subject: Protests Nos. 17866, &c., of G. Falk & Bro. Received by board of U. S. general appraisers, Feb. 5, 1904.

Exhibit B.

August 24th, 1903.

To the honorable collector of customs, port of New York:

Please take notice that we protest against your decision as to the rate and amount of duties to be paid on one bale leaf tobacco, marked and

numbered 2263, one bale imported per S. S. "Ryndam" from Rotterdam, entered by us June 2nd, 1902, for warehouse bond No. 62001, entry No. 101451, reliquidated and withdrawn from warehouse August 21st, 1903, and claim, as reasons for our objections thereto:

That under the law, and particularly under section 20 of the customs administrative act of June 10, 1890, as amended by the act of
10 Congress approved December 15th, 1902, we should be required to pay only the duties and charges to which the merchandise is subject by law at the time of its withdrawal from bonded warehouse for consumption.

We contend that the customs officials erred in levying and collecting duties upon the weight of the merchandise at the time of its entry or importation, and that under the law they should reweigh the goods at the time of their withdrawal from bonded warehouse, and that the duties should be levied and based upon the weight at the time of such withdrawal (see weigher's return annexed); and we ask to have refunded to us the difference between the duties based upon the weight at the time of entry, and the duties based upon the weight at the time of withdrawal from warehouse.

We further claim that our demand that the merchandise be reweighed by the Government at time of its withdrawal from warehouse having been refused, a new ascertainment or reliquidation of the duties has occurred, and we are entitled to protest within ten days after such ascertainment or reliquidation.

We pay the amount exacted under compulsion, solely to get the goods, reserving all rights.

G. FALK & BRO.,
By HATCH, KEENER & CLUTE,
Attorneys for Importers,
100 Broadway, New York City.

(Endorsed:) 106, 197, 17868. G. Falk & Bro. "Ryndam." Admin. (Leaf tobacco. Too late.) Vessel, "Ryndam," entry, 1902, June 2, Liq. 1902, Jul. 3, Pro. 1903, Aug. 25, custom-house, New York, Aug. 25, 1903, received. Entry No. 101451 was liquidated July 3, 1902. The protest was lodged August 25, 1903; not entertained; not in time.

11 United States Circuit Court, Southern District of New York.

G. FALK & BRO. *against* THE UNITED STATES. } Suit No. 3577. Stipulation.

It is hereby stipulated by and between the attorneys for the respective parties in the above-entitled action that Exhibits C and D, contained in the return of the Board of United States General Appraisers, and the weighers' returns attached thereto, need not be printed in the record on appeal herein to the United States Circuit Court of Appeals for the Second Circuit, but the said exhibits and weighers' returns may be offered

by either party on the argument of this cas in the said Circuit Court of Appeals for the inspection of the court.

Dated New York, February 14, 1905.

HATCH, KEENER & CLUTE,
Attorneys for Appellee.
HENRY L. BURNETT,
Attorney for Appellant.

(Endorsed:) U. S. Circuit Court, Southern District of New York. Filed Feb. 15, 1905. John A. Shields, clerk.

12 EXHIBIT E.

NEW YORK, *May 25, 1904.*

United States General Appraisers.
Leaf tobacco (weight of)

17668
In the matter of protest 106,197 9 18401 of G. Falk & Co. against the
21870
assessment of duty by the collector of customs at the port of New York.

Before Board No. 3. Somerville, general appraiser.

The merchandise in question consists of tobacco, entered for warehouse, the original warehouse entry being liquidated June 3, 1903. Duty was assessed on the weight of the tobacco as found and returned by the U. S. weigher at the time of importation. The importer demanded that the merchandise be reweighed at the time of withdrawal from warehouse, which request was refused by the collector. The importer claimed that the tobacco was dutiable upon the basis of the weight on withdrawal, and not upon entry. This precise question was passed on by the Board In re Schmidt, G. A. 4214 (T. D. 19715), where it was held, as we think correctly, that the dutiable weight of the tobacco was to be estimated at the time of importation, and not at the time of withdrawal.

The protest is overruled and the collector's decision affirmed.

(Sd.) BYRON S. WAITE,
H. M. SOMERVILLE,
EUGENE G. HAY,
Board of U. S. General Appraisers.

2 enclosures.
Entry and invoice returned herewith.
Entry 101451 02.
Col. L. Feb. 4, 1904.
J. L. K.

13 EXHIBIT F.

For publication. Copy of G. A. 4214.

JULY 14, 1898.

Before the U. S. General Appraisers at New York.

In the matter of the protest 29,636-F, &c., of L. Schmid & Co. et al. against the decision of the collector of customs at New York as to the rate and amount of duties chargeable on certain merchandise imported per the vessels and entered on the dates named in the schedule.

Opinion by SOMERVILLE, G. A.

The goods in question consist of tobacco, some of which was imported prior to July 24, 1897, and some after said date. All of the merchandise was entered under bond for warehousing without the payment of duty, at the respective dates shown by the record, and was withdrawn from warehouse after the present tariff act of 1897 went into legal effect, and was assessed for duty by the collector under appropriate paragraphs of said act, upon the bases of the weights of the goods as ascertained at the several dates of entry.

The contention in each of the protests is the same, being in the following language:

"We claim said merchandise to be subject to duty under the provisions of Schedule F of the act of July 24, 1897, based upon the weight at time of its withdrawal from bond for consumption under the provisions of sections 50 of the act of October 1, 1890.

We claim that the proviso to section 50 of the act of October 1,
14 1890, has not been repealed, but is in full force and effect and is applicable to merchandise entered in bond subsequent to the passage of the act of July 24, 1897.

Section 33 of the present tariff act (of 1897) was construed by the Board in re Haynes & Co. (G. A. 4033) where certain features of the section are discussed at some length. It is perfectly clear that an irreconcilable repugnancy exists between the provisions of section 50 of the tariff act of 1890, and those of section 33 of the act of 1897, and therefore the former section is necessarily repealed by the latter. Especially is this true as to the provisos attached to those sections relating to the weights of such merchandise. The last proviso of said section 50 reads as follows:

Provided further: That when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse said duties shall be levied and collected upon the weight of such merchandise at the time of its withdrawal."

That of said section 33 is as follows:

Provided, That when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise at the time of its entry.

It requires no argument to demonstrate that the latter proviso repeals the former, a conclusion which is rendered more emphatic by the provisions of section 34 of the tariff act of 1897. Nor are we able to perceive any sound reasons that could be urged to invalidate such a law because made applicable to prior importations not then completed by a delivery of the importations in question to the consignees or owners. Westfall v. Shook, 5 Blatch., 383; cited in re Wolff, G. A. 2775; and in re Louisville Pub. Warehouse Co., G. A. 2816.

15 Without considering the question as to whether the protests were filed in time, we base our decision on the proposition that section 50 of the tariff act of 1890, on which the protestants predicate their right of recovery, has been repealed by section 33 of the tariff act of 1897 now in force.

All the protests are overruled, and the collector's decision in each case is affirmed.

And for a certified statement of the facts involved in said matter, as ascertained by them, the said Board states that said facts are fully set fourth in the decision afore mentioned, and that no other facts were ascertained by said Board than such as are shown by said decision and other exhibits hereto attached.

B. S. WAITE,
H. M. SOMERVILLE,
EUGENE G. HAY,
Board of U. S. General Appraisers.

(Endorsed:) No. 3577. U. S. Circuit Court, Southern District of New York. In the matter of the application of G. Falk & Bro. for a review of the decision of the Board of U. S. General Appraisers as to the rate and amount of duty on certain imported merchandise. Return of the Board of U. S. General Appraisers. U. S. Circuit Court, Southern District of New York. Filed Jul. 22, 1904. John A. Shields, clerk.

16 At a stated term of the Circuit Court of the United States, for the Southern District of New York, in the Second Circuit, held at the United States court rooms, in the city of New York, on the 2d day of August, 1904.

Present: Hon. E. Henry Lacombe, circuit judge.

G. FALK & BRO.
against
THE UNITED STATES. } Suit No. 3577.

On the application of G. Falk & Bro., through their attorneys, Hatch, Keener & Clute, No. 100 Broadway, borough of Manhattan, city of New York, it is

Ordered that this cause be referred to Hon. Marion L. De Vries, one of the United States General Appraisers, as an officer of this court, to take and return to the court such further evidence herein as may be offered by the said G. Falk & Bro., or their attorneys, and that the United States attorney for the Southern District of New York have reasonable notice of the time and place of taking such further evidence.

E. HENRY LACOMBE,
United States Circuit Judge.

(Endorsed:) United States Circuit Court, Southern District of New York. G. Falk & Bro. v. The United States. Suit No. 3577.
17 Order of reference. Hatch, Keener & Clute, Attys. for importers, 100 Broadway, N. Y. City. U. S. Circuit Court, Southern District of New York. Filed Aug. 3, 1904. John A. Shields, clerk.

United States Circuit Court, Southern District of New York.

G. FALK & BRO. vs. THE UNITED STATES. } No. 3577.

AMERICAN CIGAR COMPANY vs. THE UNITED STATES. } No. 3606.

Appeals from decisions of the Board of United States General Appraisers.

PLATT, District Judge.

The merchandise in question consists of certain tobacco, entered in bonded warehouse and subsequently withdrawn. At the time of withdrawal the importer claimed that such tobacco had lost in weight and that duties should be assessed thereon according to the weight at the time of withdrawal, the collector having liquidated the duties upon the entered weight of such merchandise.

18 The position taken by the Board of General Appraisers, namely, that section 33 of the act of 1897 is repugnant to section 50 of the act of 1890, is untenable, because neither of said sections is general in its application, but is restricted to merchandise previously imported for which no entry has been made.

Upon another ground, however, it would seem that the general position taken by the Board ought to be sustained. The importers contend that section 20 of the act of June 10, 1890, as amended by the act of December 15, 1902, authorizes them to withdraw the merchandise from the warehouse upon payment of duties and charges based upon its weight at the time of withdrawal. To reach this conclusion they are obliged to contend that the section just quoted repeals section 2983 of the Revised Statutes, which reads:

"In no case shall there be any abatement of the duties or allowance made for any injury, damage, deterioration, loss, or leakage sustained by any merchandise while deposited in any public or private bonded warehouse."

That is, they are forced to make that contention if the plain reading of section 2983 covers such a loss of weight as occurred in the case of the merchandise in question. It seems too plain for discussion that the word "loss" coupled as it is in the disjunctive with "leakage" applies precisely to such a case as the one before us. I can not find any sound reason for believing that the Congress did not have section 2983 in mind when it enacted said section 20, as amended. It is obvious that section 20, especially as amended, refers exclusively to rate rather than

19 weight. For these reasons the decision of the Board of Appraisers ought to be sustained.

Decision affirmed.

J. Stuart Tompkins, Attorney for Importers.

Henry A. Wise, Asst. U. S. atty. for United States.

(Endorsed:) United States Circuit Court, Southern District of New York. G. Falk & Bro. vs. The United States (3577). American Cigar

Company vs. The United States (No. 3606). Opinion, Platt, J. U. S. Circuit Court, Southern District of New York. Filed Dec. 22, 1904. John A. Shields, clerk.

At a stated term of the Circuit Court of the United States, for the Southern District of New York, held at the United States Circuit Court rooms in the Post-Office building, in the city of New York, on the 23d day of December, in the year of our Lord one thousand nine hundred and four.

Present: The Hon. James P. Platt, judge.

G. FALK & BRO. *vs.* UNITED STATES. } "A" suit No. 3577. Cal. No. 168.

20a The above cause coming on for hearing and determination before this court on the application of G. Falk & Bro., importers, for a review of the questions of law and fact involved in the decisions of the Board of U. S. Appraisers herein, and on the return of the Board of General Appraisers of the record and evidence taken by them, with their statement of the facts involved therein, together with their decisions thereon.

Now, after hearing Henry A. Wise, asst. U. S. attorney, on behalf of the collector for affirmance, and Hatch, Keener & Clute, counsel for the said importers, for reversal, on motion of Henry L. Burnett, U. S. attorney,

It is ordered, adjudged, and decreed that there was no error in said proceedings before said Board of General Appraisers, and that their decisions herein be and the same are hereby in all things affirmed.

JAMES P. PLATT,
U. S. Judge.

(Endorsed:) "A" suit No. 3577. U. S. Circuit Court, Southern District of New York. G. Falk & Bro. vs. United States. Judgment of affirmance. Henry L. Burnett, U. S. attorney. U. S. Circuit Court, Southern District of New York. Filed Dec. 20, 1904. John A. Shields, clerk.

21 United States Circuit Court, Southern District of New York.

G. FALK & BRO., APPELLANT, *v.* THE UNITED STATES, APPELLEE. } Application for allowance of appeal.

To the honorable judges of said court:

The petition of Gustav Falk, doing business at No. 171 Water street, in the city of New York, under the name of G. Falk & Bro., prays that the petitioner may be allowed, by his attorneys, Hatch, Keener & Clute, an appeal to the United States Circuit Court of Appeals for the Second Circuit, from the decree passed and the judgment entered in pursuance thereof in this case, on the 23d day of December, 1904, affirming the decision of the Board of United States General Appraisers, which overruled the protest of the importer; and that a proper citation may be

issued and served upon Nevada N. Stranahan, collector of customs at the port of New York, or his attorney; and that the record of said decree and judgment, and all papers relating thereto, shall be transmitted to said United States Circuit Court of Appeals for the Second Circuit, in
22 order that the said decree may be reviewed and reversed by said United States Circuit Court of Appeals.

HATCH, KEENER & CLUTE,
Attorneys for Appellant,
100 Broadway, Borough of Manhattan, City of New York.

Allowed.

E. H. LACOMBE,
United States Circuit Judge.

(Endorsed:) United States Circuit Court, Southern District of New York. G. Falk & Bro., appellant, vs. The United States. Suit No. 3577. Application for allowance of appeal. Hatch, Keener & Clute, attys. for appellant, 100 Broadway, N. Y. City. A copy of the within paper has been this day received at this office. Jan. 21, 1905. Henry L. Burnett, U. S. atty. U. S. Circuit Court, Southern District of New York. Filed Jan. 21, 1905. John A. Shields, clerk.

United States Circuit Court, Southern District of New York.

G. FALK & BRO., APPELLANT, } Assignment of errors.
v.
THE UNITED STATES, APPELLEE, } Suit No. 3577.

Now comes the appellant, Gustav Falk, doing business at No.
23 171 Water street, in the city of New York, under the name of G. Falk & Bro., and files the following assignment of errors, upon which he will rely and which are intended to be urged upon his appeal herein.

I. The United States Circuit Court for the Southern District of New York, erred in affirming and in not reversing the decision of the Board of United States General Appraisers herein.

II. The said court erred in sustaining and in not reversing the decision of the collector.

III. The said court erred in holding that the duties in question were properly collected, and based upon the weight of the tobacco at the time of entry.

IV. The said court erred in holding that section 2983 of the United States Revised Statutes was applicable and in not holding that it was inapplicable to this case.

V. The court erred in holding, either directly or by implication, that any injury, damage, deterioration, loss or leakage was sustained by the merchandise in controversy while deposited in any public or private bonded warehouse, within the meaning of said section 2983.

VI. The court erred in holding, directly or by implication, that said section 2983 has not been repealed, and in not holding that it has been repealed or modified by section 20 of the customs administrative act of June 10, 1890, or by said section 20, as amended by the act of Congress, approved December 15, 1902.

VII. The court erred in holding either that section 20 of the act of June 10, 1809, or that said section 20, as amended by the said
24 act of December 15, 1902, refers exclusively to rate rather than weight, and in not holding that the said acts refer both to rate and weight or amount of duties.

VIII. The said court erred in not holding that under the law, and particularly under the said section 20, as amended, the importer herein should be required to pay only the duties and charges to which the merchandise was subject by law at the time of its withdrawal from bonded warehouse for consumption.

IX. The said court erred in not holding that the customs officials erred in levying and collecting duties upon the weight of the merchandise at the time of its entry or importation, and in not holding that under the law the customs officials should reweigh the goods at the time of their withdrawal from bonded warehouse, and that the duties should be levied and based upon the weight at the time of such withdrawal, and also in not directing judgment refunding to Gustav Falk, the difference between the duties based upon the weight at the time of entry, and the duties based upon the weight at the time of withdrawal from warehouse.

HATCH, KEENER & CLUTE,
Attorneys for Appellant, No. 100 Broadway,
Borough of Manhattan, City of New York.

Dated New York, January 19, 1905.

(Endorsed:) United States Circuit Court, Southern District of New York. G. Falk & Bro., appellant, against The United States. Suit No. 3577. Assignment of errors. Hatch, Keener & Clute, attys. for appellant, 100 Broadway, N. Y. City. U. S. Circuit Court, Southern District of New York. Filed Jan. 20, 1905. John A. Shields, clerk.

25 Know all men by these presents, that I, Vincent P. Donihee, residing at No. 147 West 61st street, in the city of New York, am held and firmly bound unto the United States of America in the sum of two hundred and fifty ($250) dollars, to be paid to the United States of America, for the payment of which, well and truly to be made, I bind myself, my heirs, executors, and administrators firmly by these presents.

Sealed with my seal and dated the 19th day of January, in the year nineteen hundred and five.

Whereas Gustav Falk has applied to the United States Circuit Court of Appeals for the Second Circuit for the allowance of an appeal from the decision of the United States Circuit Court for the Southern District of New York, rendered on the day of , 1904, in an action of said G. Falk & Bro. against the United States.

Now, therefore, the condition of this obligation is such that if the said Gustav Falk shall prosecute said appeal with effect and shall answer all costs of the appeal which may be awarded against them if they fail to make good said appeal, then the obligation shall be void; otherwise to remain in full force and effect.

VINCENT P. DONIHEE.

Sealed and delivered and taken and acknowledged this 19th day of January, 1905.

[SEAL.] GEORGE S. LUDLOW,
Notary Public, N. Y. Co.

26 UNITED STATES OF AMERICA,
Southern District of New York, County of New York, ss:

Vincent P. Donihee, being duly sworn, says that he resides in the Southern District of New York, in the city of New York, and that he is worth the sum of two hundred and fifty ($250) dollars, over and above all his just debts and liabilities.

VINCENT P. DONIHEE.

Sworn to before me this 19th day January, 1905.

[SEAL.] GEORGE S. LUDLOW,
Notary Public, New York County.

Approved.

E. H. LACOMBE, *U. S. Circuit Judge.*

(Endorsed:) United States Circuit Court, Southern District of New York. G. Falk & Bro., appellant, against The United States, appellee. Suit No. 3577. Bond. Hatch, Keener & Clute, attys. for appellant, 100 Broadway, N. Y. City. U. S. Circuit Court, Southern District of New York. Filed Jan. 20, 1905. John A. Shields, clerk.

27 By the Honorable E. H. Lacombe, one of the judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit, to Nevada N. Stranahan, collector of customs of the port of New York, greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden in the borough of Manhattan, in the city of New York, in the district and circuit above named, on the 17th day of February, 1905, pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein G. Falk & Bro. is appellant and the United States appellee, and you are required to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the borough of Manhattan, in the city of New York, in the district and circuit above named this 20th day of January, in the year of our Lord one thousand nine hundred and five, and of the Independence of these United States, the one hundred and twenty-ninth.

E. H. LACOMBE,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

(Endorsed:) United States Circuit Court of Appeals for the Second Circuit. G. Falk & Bro., appellant, vs. The United States,
28 appellee. Suit No. 3577. Citation. Hatch, Keener & Clute, 100 Broadway, N. Y. City, attys. for appellant. A copy of the within paper has been this day received at this office. Jan. 21, 1905. Henry L. Burnett, U. S. attorney. U. S. Circuit Court, Southern District of New York. Filed Jan. 21, 1905. John A. Shields, clerk.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, do hereby certify that the foregoing pages, numbered from one to thirty, inclusive, contain a true and complete transcript of the record and proceeding had in said court, in the cause entitled G. Falk & Bro., appellant, against The United States, appellee (suit No. 3577), as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the Southern District of New York, in the Second Circuit, this 28th day of February, in the year of our Lord one thousand nine hundred and five, and of the Independence of the said United States the one hundred and twenty-ninth.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

29 United States Circuit Court of Appeals for the Second Circuit.

Nos. 69 and 70. October term, 1905.

Argued December 22, 1905. Decided January 17, 1906.

THE AMERICAN CIGAR COMPANY, APPELLANT,
vs.
THE UNITED STATES, APPELLEE.
[3606]

G. FALK & BROTHER, APPELLANTS,
vs.
THE UNITED STATES, APPELLEE.
[3577]

Appeals from the Circuit Court of the United States for the Southern District of New York.
Before Judges Lacombe, Townsend, and Coxe.

These causes come here upon appeals by the importers from a decision of the United States Circuit Court for the Southern District of New York, affirming a decision of the Board of General Appraisers, which sustained the action of the collector.

TOWNSEND, Circuit Judge.

In the case of The American Cigar Company v. The United States, the merchandise in question, leaf tobacco, imported under the provisions of the act of July 24, 1897, was duly placed in bonded warehouse, properly classified for duty under paragraph 213 of said act, and assessed
30 for duty on the basis of weight "at the time of its entry," under section 33 of said act. There is nothing in the record to show that this assessment was not based upon the actual weight of the tobacco upon its arrival at the port of New York. Some time afterwards, when the importer made a withdrawal of tobacco from the warehouse, it was ascertained that it weighed considerably less than at the date of entry.

The importer, however, within ten days after liquidation and before withdrawal of the tobacco from bond, had filed a protest, claiming that under the provisions of section 20 of the customs administrative act of June 10, 1890, it should be required to pay only the charges to which

such merchandise should be subject at the time of its withdrawal for consumption.

No other ground of protest was stated or is claimed herein.

The Board overruled the protest, on the ground that it was prematurely filed, because no cause of action could arise—

"until the withdrawal of the merchandise from bond, for until then it could not be assumed that the collector would refuse to reliquidate the entry upon the basis claimed by the importer, nor could it be known or ascertained that there was any change in the weight of the tobacco until withdrawn and actually weighed."

Furthermore, the original liquidation might be subject to revision by reason of alteration of the law, or of such changes in the character or condition of the merchandise as would make it the duty of the collector to revise his original classification.

Section 14 of the customs administrative act provides that all objections of this kind in the nature of protests must be filed within ten days after "but not before such ascertainment and liquidation of duties, as well in case of merchandise entered in bond as for consumption."

31 If upon such withdrawal it should appear that there was a change in the weight of the merchandise, and the collector should refuse to reconsider his previous action or to acquiesce in the claim of the importer, such refusal would constitute a definite and final ascertainment and liquidation of duties, against which a protest might be filed thereafter, but not before.

The decision of the court below in The American Cigar Company v. The United States is affirmed, on the ground that the protest was prematurely filed.

In Falk v. The United States the tobacco was duly entered under bond for warehousing without payment of duty. When it was subsequently withdrawn, the importer claimed that the tobacco had lost weight by reason of evaporation of moisture, and demanded that it be reweighed, claiming that it was dutiable upon the basis of the weight on withdrawal and not on entry. The collector refused the demand of the importer, and assessed duty on the weight of the tobacco as returned by the United States weigher at the time of importation. Within ten days after such refusal this protest was filed, and the question as to the propriety of the action of the collector of the Board in affirming his action and of the court below in sustaining the decision of the Board are properly before this court for review.

The court below reached its conclusion, on the ground that the case was governed by the provision of section 2983, of the Revised Statutes, that—

"In no case shall there be any abatement of the duties or allowance made for any injury, damage, deterioration, loss, or leakage sustained by any merchandise, while deposited in any public or private bonded warehouse."

We are unable to concur in this conclusion. There is no claim herein for any injury or loss sustained by the merchandise in question. None of the taxable subject-matter has been lost. All of the other terms, "injury, damage, deterioration, leakage," refer to actual reduction

32 in the value or quantity of the merchandise itself. That the loss provided for in this section relates solely to the loss of the mer-

chandise subject to duty is further indicated by the language of section 2964, which provides for an abatement or refund of duties in case of "actual injury or destruction, in whole or in part, of any merchandise by accidental fire or other casualty" when in a warehouse.

Thus, by these two sections, the importer is protected in case of loss of warehoused merchandise by casualty, the Government is protected in case of loss of merchandise from any other cause. It is clear that evaporation of moisture is not "loss * * * sustained by * * * merchandise."

This merchandise was dutiable under the provisions of paragraph 213 of the act of 1897, as wrapper tobacco unstemmed, at $1.85 cents per pound. The difference between its weight when entered in the warehouse and when withdrawn for consumption was due to evaporation of moisture while in the warehouse.

The general rule is that revenue can be collected only upon the quantity or weight of the taxable subject-matter which is actually imported and received by the importer so as to come into the consumption of the country. Marriott v. Brune (9 How., 619); Lawder v. Stone (187 U. S., 281.)

We have seen that the provision as to leakage and loss has no application to evaporation of moisture. This case is analogous to Seeberger v. Wright & Lawther Co. (157 U. S., 183), where the difference in weight and consequently in rate was due to the removal of nontaxable accidental impurities. There, the United States Supreme Court held that where the amount of such impurities could be fixed at a certain percentage it should be deducted from the taxable product and allowance made therefor.

33 Section 33 of the act of 1897 provided as follows:

"That when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise at the time of its entry."

Section 20 of the customs administrative act of June 10, 1890, as amended in section 54 of the tariff act of October 1, 1890, provided as follows:

"Any merchandise deposited in bond in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal."

This section was amended by the act of December 15, 1902, by the addition of the following:

"Provided, that the same rate of duty shall be collected thereon as may be imposed by law upon like articles of merchandise imported at the time of the withdrawal."

In Mosle v. Bidwell (130 Fed., 334), in discussing this act as amended, this court held that the amendment of 1902 was declaratory of the meaning of the statute prior to said amendment, and that its meaning as thus declared was that no greater or different duties could be imposed than those to which other like goods imported at the time of withdrawal would be subject.

We think this decision is conclusive upon the question herein. If other like goods had been imported at the time when these goods were with-

drawn, duty would have been assessed thereon according to their weight at such time.

That this language should not be construed to mean the duties
34 assessed on the original entry is shown by the language of section 2970 of the United States Revised Statutes, which is as follows: "Any merchandise deposited in bond in any public or private bonded warehouse may be withdrawn for consumption within one year from the date of the original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal; and after one year from the date of the original importation, and until the expiration of three years from such date, any merchandise in bond may be withdrawn for consumption on payment of the duties assessed on the original entry and charges, and an additional duty of ten per centum of the amount of such duties and charges."

Section 20 of the customs administrative act, as shown above, reenacted the provision as to payment of duties on withdrawal. But in section 2970 the distinction is sharply drawn between "duties * * * to which it may be subject by law at the time of withdrawal" and "duties assessed on the original entry."

It is well settled that the importation is not complete while the goods remain in the custody of the officers of customs, Fabbri v. Murphy (95 U. S., 191), and that the liquidation by the collector is not necessarily final until after the goods have been delivered to the importer. Hartranft v. Oliver (125 U. S., 525, 528).

The decision of the court below in G. Falk & Brother v. the United States is reversed.

J. S. Tompkins, for the appellants.
H. A. Wise, for the appellee.

35 At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court rooms in the post-office building in the city of New York, on the 29th day of January, one thousand nine hundred and six.

Present: Hon. E. Henry Lacombe, Hon. William K. Townsend, Hon. Alfred C. Coxe, circuit judges.

G. Falk & Brother, appellants,
vs.
United States, appellee. } 3577.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said Circuit Court be and it hereby is reversed.

It is further ordered that a mandate issue to the said Circuit Court in accordance with this decree.

E. H. L.
A. C. C.

36 Endorsed: United States Circuit Court of Appeals, Second Circuit. Falk vs. U. S. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 29, 1906. William Parkin, clerk.

37 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 34, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of G. Falk & Brother against United States, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 9th day of April, in the year of our Lord one thousand nine hundred and six and of the Independence of the said United States the one hundred and thirtieth.

[SEAL.] WM. PARKIN, *Clerk.*

38 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States Circuit Court of Appeals for the Second Circuit, greeting:

Being informed that there is now pending before you a suit in which G. Falk & Brother are appellants and the United States is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the Circuit Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme
39 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the first day of May, in the year of our Lord one thousand nine hundred and six.

[SEAL] JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

40 (Indorsed:) File No. 20204. Supreme Court of the United States, No. 702, October term, 1905. The United States vs. G. Falk & Brother. Writ of certiorari. United States Circuit Court of Appeals, Second Circuit. Filed May 10, 1906. William Parkin, clerk.

41 Supreme Court of the United States, October term, 1905.

THE UNITED STATES
vs.
G. FALK & BROTHER. } No. 702.

Stipulation as to return.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court shall be taken as the return of the clerk of the Circuit Court of Appeals for the Second Circuit to the writ of certiorari issued herein.

HENRY M. HOYT,
Solicitor-General.
HATCH, KEENER & CLUTE,
Counsel for Respondents.

MAY 2, 1906.

(Endorsed:) U. S. vs. Falk. Stipulation. United States Circuit Court of Appeals, Second Circuit. Filed May 10, 1906. William Parkin, clerk.

42 *To the honorable the Supreme Court of the United States, greeting:*

The record and all proceedings whereof mention is within made having been lately certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is herewith annexed, and certified as a return to the writ of certiorari issued herein.

Dated New York, May 10, 1906.

[SEAL] WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

43 (Indorsed:) United States Circuit Court of Appeals, Second Circuit. G. Falk & Bro. v. U. S. Return to writ of certiorair. Supreme Court U. S. Office of the clerk. Received May 14th, 1906.

44 (Indorsed:) File No. 20204. Supreme Court U. S., October term, 1905. Term No. 702. The United States, petitioner, vs. G. Falk & Brother. Writ of certiorari and return. Filed May 14, 1906.

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